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In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)

Adversary Proceeding

JAMIE L. FRAZIER, SR.)

(Chapter 13 Case Number 02-41136))

Number 02-4133

Debtor)

JAMIE L. FRAZIER, SR.)

Plaintiff)

v.)

STATE OF GEORGIA,)

Defendant)

FILED (RW)
at 12 O'clock & 45 min P M
Date 01 AUGUST 2003

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

Jamie L. Frazier, Sr. ("Debtor") filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code on April 10, 2002. On October 7, 2002, Debtor filed an adversary complaint against the State of Georgia ("State") seeking a declaratory judgment ordering the State to reinstate his license to operate a motor vehicle. On November 13, 2002, the State filed a Motion for Summary Judgment in response to the complaint. This Court

granted the State's motion in an order filed June 12, 2003 ("Order"). On June 23, 2003, the State filed a motion asking this Court to reconsider that Order. Specifically, the State asked the Court to reconsider its determination that 11 U.S.C. §106 is a constitutionally valid abrogation of the State's Eleventh Amendment sovereign immunity. The State has put forth three arguments as to why this Court should reconsider its prior Order. For the reasons that follow, the motion of the State is denied and this Court's Order is reaffirmed.

1. "Likely" Waiver of Sovereign Immunity

For its first argument, the State has proffered that this Court should not have decided the question of the constitutionality of 11 U.S.C. §106 because it had "likely" waived its sovereign immunity by filing a proof of claim in Debtor's underlying case. In contrast, the State originally pled in its Answer filed November 6, 2002, that Debtor's, "Complaint is barred by the Eleventh Amendment to the United States Constitution." (Defendant's Answer, Second Defense). In making its current argument, the State seems to engage in a bit of gamesmanship. While it is true that the State neither briefed nor argued the sovereign immunity issue in the January 16, 2003, hearing before this Court, it also never retracted the original defense. Had I ruled in favor of Debtor and not discussed the issue of sovereign immunity, the State clearly could have raised the issue of sovereign immunity on appeal.¹ Thus, the constitutional defense

¹The State could have raised the immunity issue even it had not been pled as a defense in the original case. The Supreme Court has repeatedly held that a state may raise Eleventh Amendment immunity for the first time on appeal. *See, e.g. Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed. 2d 662 (1974). However, Supreme Court Justice Kennedy has expressed his doubts concerning the propriety of this rule and characterized the Court's approval of belated assertions of Eleventh Amendment immunity as, "allow(ing) States to proceed to judgment without facing any real

was properly before this Court.

2. *Court Should have Exercised its Discretion and Declined to Address the Jurisdictional Issue*

The State has argued that, “[f]ederal courts are *required* to consider whether the Eleventh Amendment deprives them of jurisdiction only if the State defendant *insists* that the courts make such a determination.” (Defendant’s Memorandum of Law, pg. 3) (emphasis added). Further, it argues that since it did not “insist” that this Court make any such determination, this Court should have limited the Order to the merits of the case and not discussed jurisdiction as it related to sovereign immunity. While it is true that the State did not “insist” that this Court address the sovereign immunity issue, this fact does not mean that this Court was precluded from addressing the issue at its discretion.

Prior to 1998, several Courts of Appeals relied on “hypothetical jurisdiction” in order to hypothetically assume jurisdiction over a case and dismiss it on its merits without actually ruling on jurisdiction.² The Supreme Court, however, rejected this doctrine. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94, 118 S.Ct. 1003, 1012, 140 L.Ed.2d

risk of adverse consequences.” Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 394, 118 S.Ct. 2047, 2055, 141 L.Ed.2d 364 (1998)(Kennedy, J., concurring).

²Hypothetical jurisdiction applied to cases where the jurisdictional issue was difficult, the law was not well-established, and a decision on the merits favored the party who raised the jurisdictional bar. See Smith v. Avino, 91 F.3d 105, 108 (11th Cir. 1996) *abrogated by* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

210 (1998) (declining to endorse the doctrine of hypothetical jurisdiction, noting that a long and venerable line of cases have held that, without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit). Following the Supreme Court's lead, the Eleventh Circuit declared that, "an assertion of Eleventh Amendment immunity must be resolved before a court may address the merits of the underlying claim(s)." Seaborn v. Florida Dept. of Corrections, 143 F.3d 1405, 1407 (11th Cir. 1998).

Even in light of Steel, some circuits have held that a court can reserve questions of Eleventh Amendment immunity and resolve a case on the merits in favor of the party asserting immunity. See Parella v. Ret. Bd. of Rhode Island Employees' Ret. Sys., 173 F.3d 46, 53-57 (1st Cir.1999); Brindley v. Best, 192 F.3d 525, 531 (6th Cir.1999); Kennedy v. Nat'l Juvenile Detention Ass'n, 187 F.3d 690, 696 (7th Cir.1999); U.S. ex rel. Long v. SCS Bus. & Technical Inst., 173 F.3d 890, 896-97 (D.C.Cir.1999). In contrast, other circuits have ruled that Eleventh Amendment immunity cannot be bypassed before considering the merits. See U.S. v. Tex. Tech Univ., 171 F.3d 279, 285-88 (5th Cir.1999); Cal. Franchise Tax Bd. v. Jackson, 184 F.3d 1046, 1048 (9th Cir.1999).

In McClendon v. Georgia Dept. of Community Health the Eleventh Circuit found a circumstance where it was not appropriate to address the Eleventh Amendment immunity issue before ruling on the merits of the case. 261 F.3d 1252, 1258 (11th Cir. 2001).

The State's position in that case was important and the court characterized it as follows:

We interpret the defendants' position as a conditional assertion of Eleventh Amendment sovereign immunity--they insist upon that defense only if it is necessary to prevent judgment against them on the merits. In other words, the defendants are willing to withhold the assertion of the Eleventh Amendment provided that our disposition of the merits issue is favorable to them. Only if we are going to decide the merits issue against them do they insist upon a ruling on the Eleventh Amendment issue.

261 F.3d at 1258

Here, this Court was never made aware that the State desired a ruling only on the merits of the case while bypassing all immunity defenses. Further, McClendon did not abrogate this Court's ability to decide sovereign immunity issues even if the State had invited this Court to rule only on the merits. Instead, it held that:

Of course, a state or its officials cannot force a federal court to decide the merits of a claim before addressing the Eleventh Amendment issue, and we can raise an Eleventh Amendment issue on our own motion. Our holding is limited to the conclusion that the conditional assertion of the Eleventh Amendment gives a federal court the discretion to dispose of the merits favorably to the state or its officials if it chooses to do so.

261 F.3d at 1259 (internal citation omitted).

Here, the State's assertion was never conditional as in McClendon and even if it had been I would still exercise my discretion and address the issue of sovereign immunity.

Importantly, this Court's Order was issued after Debtor sought to dismiss his adversary complaint. In a hearing on Debtor's Motion to Dismiss and the State's objection to such motion, the State argued that it desired, "a resolution of the question about whether the pre-petition suspension of a driver's license for failure to pay child support violates the automatic stay as it is an issue that arises with some frequency." (Defendant's Objection to Plaintiff's Dismissal of Adversary Complaint, pg. 2). Clearly, the State was seeking an order that would have application outside of the instant case. Like the State, this Court has the issue of Eleventh Amendment immunity raised with "some frequency." It is an important issue which needs to be addressed in order to assure judicial economy in future cases when the issue will inevitably arise again. I have found that §106 is a constitutionally valid abrogation of the State's Eleventh Amendment sovereign immunity and expect to rule likewise in future cases unless a contrary final determination of this issue is made by a higher court.

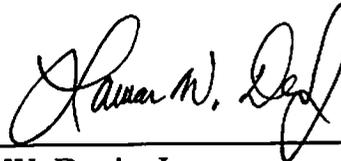
3. This Court's Reliance on the Sixth Circuit in Hood is Misplaced

For the reasons stated in my June 12, 2003 Order, this Court still finds the holding of the Sixth Circuit in Hood v. Tennessee Student Assistance Corp. (In re Hood), 319

F.3d 755 (6th Cir. 2003) *petition for cert. filed*, 71 U.S.LW. 3724 (May 2, 2003) (No. 02-1606), persuasive.

ORDER

The State's Motion for Reconsideration is Denied. IT IS SO ORDERED.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 1st day of August, 2003.

cc: Debtor Frazier
Debtor's Atty. Gastin 08/01/03
~~Creditor~~ (DW)
Creditor's Atty. Feacs
Trustee Brown
~~U. S. Trustee~~